



National Aeronautics and  
Space Administration  
Washington, DC 20546

# Procurement Notice

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## **CLARIFICATIONS OF CONTRACTING OFFICER TECHNICAL REPRESENTATIVES' (COTR) RESPONSIBILITIES AND PROPER MARKING OF TECHNICAL DATA AND REFRESHER TRAINING**

**BACKGROUND:** Recent reviews have highlighted the need to clarify the responsibilities of Contracting Officer Technical Representatives (COTRs) in their role as reviewer of technical data, submitted under the contract, and in managing their personal training requirements.

In general, FAR clause 52.227-14 provides that the Government shall have unlimited rights to technical data delivered under the contract (unless provided otherwise for limited rights data in accordance with paragraph (g) of the clause), technical data first produced in the performance of the contract, whether or not delivered, and all form, fit, and function data delivered under the contract. Such "unlimited rights" means that the Government has the right to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so. The clause also recognizes that contractors may have a legitimate proprietary interest (e.g., a property right or other valid economic interest) in data resulting from private investment and authorizes specific legends to be placed on technical data that qualify as limited rights data. The clause further states that if delivered data bear any restrictive or limiting markings not authorized by the contract, the contracting officer may cancel or ignore the markings, subject to certain procedures prescribed in the clause. The marking "proprietary," or some version thereof, is not an authorized marking.

Notwithstanding the requirements in the clause at FAR 52.227-14, some contractors mark submitted data as "proprietary" when the Government should be receiving unlimited rights data. For example, contractors have been known to place restrictive markings on Preliminary Design Review (PDR) and Critical Design Review (CDR) packages associated with major space system procurements funded by NASA, when such data clearly do not include limited rights data. The Government has unlimited rights in such data and there should be no restrictions placed on the use of the data.

FAR 27.404(h) provides guidance on the contracting officer's authority to challenge unauthorized marking of data. The contracting officer, in accordance with the clause at 52.227-14(e), has the right to either return data containing restrictive markings to the contractor, or to cancel or ignore such markings. Although the clause at 52.227-14(e) gives the contracting officer the right to cancel or ignore the unauthorized markings of data, this right may be exercised only after the contracting officer follows the procedures prescribed in 52.227-14(e). These procedures involve a written inquiry from the contracting officer requesting the contractor to provide written justification substantiating the markings. The clause also gives the contractor the ability to challenge any contracting officer's determination regarding the appropriateness of the marking by filing suit within 90 days in a court of competent jurisdiction. If the contractor files suit within 90 days of the contracting officer's determination, the contracting officer does not have the ability to "cancel or ignore" markings until the final disposition of the matter by the court. Consequently, the best way to assert the Government's right to challenge unauthorized marking is to examine the data for unauthorized marking as part of the acceptance process, return data with unauthorized markings to the contractor, and request the contractor to remove the unauthorized markings as a condition of acceptance.

Accordingly, this NASA FAR Supplement change revises 1842.270 "Contracting officer technical representative (COTR) delegations" to require that COTR training specifically address the requirement that technical data that includes improper restrictive markings by a contractor be challenged by the COTR. NASA Form 1634 Contracting Officer Technical Representative (COTR)/Alternate COTR Delegation is also revised to add this requirement.

In addition, 1842.270 is revised to clarify that COTR refresher training is required every five years following completion of basic COTR training or subsequent refresher training.

***ACTION REQUIRED BY CONTRACTING OFFICERS:*** For contracts that include the clause at 52.227-14, Rights In Data – General, ensure that COTR delegations include the responsibility to challenge improper data markings.

***CLAUSE CHANGES:*** Not Applicable.

***PARTS AFFECTED:*** 1842

***REPLACEMENT PAGES:*** You may use the enclosed pages to replace pages 42:5 and 42:6 of the NFS.

***TYPE OF RULE AND PUBLICATION DATE:*** These changes do not have a significant effect beyond the internal operating procedures of NASA and do not have a significant cost or administrative impact on contractors or offerors, and therefore do not require codification in the Code of Federal Regulations (CFR) or publication for public comment.

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Enclosures

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contracting officer possesses training, qualifications and experience commensurate with the duties and responsibilities to be delegated and the nature of the contract.

(b) NASA Form 1634, Contracting Officer Technical Representative (COTR) Delegation, shall be used to appoint COTRs. A COTR's duties and responsibilities may not be redelegated by the COTR and the COTR may be held personally liable for unauthorized acts. However, this does not prohibit the COTR from receiving assistance for the purpose of monitoring contractor progress and gathering information. When an individual is appointed as a COTR on more than one contract, separate delegations shall be issued for each contract. A separate NASA Form 1634 will be used to appoint an alternate COTR.

(c) A COTR delegation remains in effect throughout the life of the contract unless canceled in writing by the cognizant contracting officer or at any level above that contracting officer. The contracting officer may modify the delegation only by issuance of a new delegation canceling and superseding the existing delegation.

(d) A COTR shall not be authorized to initiate procurement actions or in any way cause a change to the contract or increase the Government's financial obligations. However, delegations may be made to construction contract COTRs to sign emergency on-site change orders with an estimated value not to exceed the value specified in writing by the contracting officer in the NASA Form 1634 but in no event to exceed \$25,000.

(e) Each COTR shall acknowledge receipt and accept the delegation by signing the original delegation letter. The original of the COTR delegation letter shall be filed in the applicable contract file. Copies of the signed COTR delegation letter shall be distributed to the COTR, the contractor, and each cognizant contract administration office. Acknowledgment and distribution for terminations of COTR delegations and COTR delegations which revise authority, duties and responsibilities shall follow the same rules.

(f)(1) Mandatory training for COTRs and their alternates shall include the following core topic areas:

- (i) Contracting authority and contract modifications (including non-personal services and inherently governmental functions);
- (ii) Inspection and surveillance;
- (iii) Changes and performance-based acquisition;
- (iv) Contract financial and property management (including "Limitation of Cost" clause, Anti-Deficiency Act, "Limitation of Funds" clause);
- (v) Disputes; and
- (vi) Rights in data, including the inappropriate marking of technical data as proprietary by contractors.

(2) Each COTR shall complete refresher training no later than every five years from the date of completion of basic COTR training or any subsequent refresher training.

(3) Procurement officers are responsible for assuring that the course(s) utilized by their center address the mandatory core topics in sufficient detail for the purpose of COTR training. Procurement officers may accept the following training alternative(s) in satisfaction of comparable requirement(s) specified in paragraph (f)(1) of this section:

- (i) Another center's COTR training; or
- (ii) Annual ethics training.

(g) The contracting officer shall verify that the COTR has received the mandatory training before signing NASA Form 1634. If an urgent need arises for the appointment of a COTR and no trained and otherwise qualified individual is available, then the procurement officer may make a temporary COTR appointment not to exceed six months. Temporary appointments must be so identified and clearly reflect the appointment expiration date.

(h) No technical direction may be issued by a COTR relative to performance-based acquisition requirements or when serving under a temporary appointment.

**1842.271 NASA clause.**

Insert the clause at 1852.242-70, Technical Direction, when paragraph 3(m) of the NASA Form 1634 specifically authorizes a COTR to issue technical direction.

**Subpart 1842.3--Contract Administration Office Functions****1842.302 Contract administration functions.**

(a) In addition to the responsibilities listed in FAR 42.302(a), responsibility for reviewing earned value management system (EVMS) plans and verifying initial and continuing contractor compliance with NASA and DoD EVMS criteria and conformity with ANSI/EIA Standard 748, Industry Guidelines for EVMS, is normally delegated to DCMA.

**Subpart 1842.5--Postaward Orientation****1842.503 Postaward conferences.**

(1) A postaward conference shall be held with representatives of the contract administration office when --

- (i) A contract is expected to exceed \$10,000,000;
- (ii) Contract performance is required at or near a NASA installation or NASA-controlled launch site;
- (iii) The delegation will impose an abnormal demand on the resources of the contract administration office receiving the delegation; or
- (iv) Complex contract management problems are expected, particularly risk management areas identified during program and acquisition planning, e.g., significant or unusual mission success, technical, cost, schedule, safety, security, occupational health, environmental protection, and export control risks.

(2) Procurement officer approval is required to waive a post-award planning conference for contracts meeting any of the criteria in paragraph (1) of this section. The request for procurement officer approval to waive a post-award conference shall address action taken and planned to ensure effective communication with the contract administration office during the performance of the contract.